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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 794

THE UNITED STATES OF AMERICA, on the relation of RAYMOND J. NITKEY, and RAYMOND J. NITKEY in his own behalf,

Petitioner,

vs.

CHARLES G. DAWES, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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No.

THE UNITED STATES OF AMERICA, on the relation of RAYMOND J. NITKEY, and RAYMOND J. NITKEY in his own behalf,

Petitioner,

vs.

CHARLES G. DAWES, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petitioner, the United States of America, on the relation of Raymond J. Nitkey, and Raymond J. Nitkey in his own behalf, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Statement of the Matter Involved.

This is a *qui tam* action in which a complaint was filed on June 22, 1943 (R. 2), and an amended complaint on August 19, 1943 (R. 15). The action was brought under the Informer's Act as it then existed. 31 U. S. C. A. Secs. 231-235.

Substantial amendments to the Act were adopted as of December 23, 1943. Under these amendments, proceedings were stayed by the District Court, and the United States entered its appearance on March 18, 1944. By order of December 28, 1944, the District Court denied petitioner's motion to strike the appearance of the United States, and dismissed the action for want of jurisdiction (R. 73). From this order the petitioner appealed to the United States Circuit Court of Appeals, which affirmed the order of the District Court. The Circuit Court of Appeals sought at the same time to determine the merits of the case (R. 93-96), although the issues on the merits were not before the Court.

The case involves a $90,000,000 loan from the Reconstruction Finance Corporation to the Central Republic Bank and Trust Company of Chicago on June 27, 1932, and, by agreement, a transfer on October 5, 1932, of $50,000,000 to a newly organized City National Bank and Trust Company. The City National Bank is made a defendant (R. 18, 19) on the ground that under Illinois statutory provisions it assumed liability to the Reconstruction Finance Corporation (*Ill. Revised Statutes*, ch. 16½, sec. 12), and has fraudulently concealed such liability. The other defendants (R. 16-20) are individuals who (1) as officers and directors of the Central Republic Bank and Trust Company participated in obtaining the loan of $90,000,000 from the Reconstruction Finance Corporation; (2) participated in the organization of the City National Bank and Trust Company of Chicago; became officers and directors of that company; and obtained the transfer of $50,000,000 of such loan from the Central Republic Bank and Trust Company to the City National Bank and Trust Company without assuming, directly or indirectly, obligations other than deposit liabilities in violation of what petitioner alleges to have been and to be the law of Illinois; and (3) have to the present time continued as officers or directors of the City National Bank and Trust Company, and who are alleged by petitioner to have concealed

and to be now concealing the liability of said bank under the statute of Illinois then and now in force (*Ill. Rev. Stats.*, ch. 16½, sec. 12).

The District Court's order of dismissal was affirmed by the Circuit Court of Appeals on the ground that the suit did not come within the statutory restriction that: "Every such suit shall be commenced within six years from the commission of the act and not otherwise." (U. S. Code, Title 31, Section 235). Petitioner's position was and is that this period does not run during a period of fraudulent concealment and that there was such concealment. The Circuit Court of Appeals holds that the six year period is controlling in all cases; ignores the controlling case of *Exploration Company* v. *United States*, 247 U. S. 435 (1918), which was fully presented in brief and argument; and bases its opinion upon cases involving no issue of fraud (R. 95, 97). The Circuit Court also holds that the period of six years begins to run before the accrual of a cause of action (R. 97), even though there may not be such an accrual within the six years and even though some of the transactions constituting the *Act* sued upon may have taken place within the six years.

With respect to facts of concealment the Circuit Court of Appeals alleges "a contradiction in terms" by petitioner, and immediately thereafter quotes a statement from petitioner's brief showing that there was no such contradiction (R. 95). It has never been alleged that there was lack of knowledge on the part of certain federal agencies. And the Circuit Court of Appeals takes a position unsupported by the record when it alleges that petitioner raises an inference of guilt against the Attorney General "who, after becoming acquainted with all the facts chose not to prosecute an appeal on behalf of the Government" (R. 96). It was within the discretion of the Government to control its appearance and argument (R. 86, 88), and to confine itself to its alleged right to appear by virtue of statutory change in 1943, and to argue that the amendment

of 1943 is valid in its withdrawal of certain rights from petitioner.

The original complaint in this case was filed on June 22, 1943, and an amended complaint on August 19, 1943 (R. 2, 15), both before the adoption of the amendatory act of December 23, 1943, which seeks to give the Attorney General authority to take over pending cases. Although such action was not then required by statute, the petitioner, at the time of filing these complaints served copies on the United States Department of Justice, and that Department indicated that it "would not take an active part therein" (R. 36-37). In view of the fact that serious consequences would be occasioned by the Attorney General's taking over a suit, your petitioner argued that his case did not come within the amendatory act because Section 3491 (C) of the Amendatory Act contains a proviso "That no abatement shall be had as to a suit pending at the effective date of this Act if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice." The Circuit Court of Appeals gives no attention to this issue.

The issue was preserved and argued in the Circuit Court of Appeals (R. 38, 77) that the amendatory act of 1943, if applicable to the present case, violates the Fifth Amendment, and the Circuit Court of Appeals thought it unnecessary to discuss this issue (R. 97).

Although it bases its decision on an alleged lack of jurisdiction, the Circuit Court of Appeals makes it plain that its opinion is intended to relieve the parties defendant from any charge of improper conduct, although such issue was not before the Court. In order to accomplish this purpose, the Court presents in its opinion a table which seeks to indicate that the Government suffered no loss, with an inaccurate statement

that the table was officially confirmed (R. 96, 53). The Court completely ignores a certified copy of an order of the United States District Court which is in the record and which shows a Government loss of some fifteen million dollars (R. 67-70, 66).

This Court Has Jurisdiction.

This Court has jurisdiction under United States Code, Title 28, Section 347 (a) (Judicial Code, Section 240). In this case the Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this Court." (Supreme Court Rule 38, par. 5 (b)). The appearance by and the taking over of the case by the Attorney General and the material reduction of the award which may be made to petitioner involve constitutional issues as to the validity of the amendatory act of December 23, 1943 (Chapter 377 — Public Law, 213). These issues were properly preserved in the District Court (R. 38); were the basis of the order of that Court sustaining the appearance of the Attorney General (R. 73); were preserved on review (R. 77); were the necessary basis for Circuit Court affirmance of that part of the District Court order (R. 97); but were not passed upon by the Circuit Court of Appeals, which states that its affirmance is based solely on lack of jurisdiction (R. 97, 98). This Court also has jurisdiction to determine whether the amendatory act of 1943 applies to this case.

The Questions Presented.

The question as to lack of jurisdiction is the only one presented by the opinion of the Circuit Court of Appeals (R. 97), and this issue is limited to the construction of the statute requiring suit to "be commenced within six years from the commission of the act, and not afterward." Petitioner contends (1) that some of the transactions constituting the act complained of occurred within the six years; (2) that the period

of six years does not begin to run until the accrual of a cause of action, and (3) that this period does not run during a period of fraudulent concealment. Should this Court adhere to its position in *Exploration Company* v. *United States*, 247 U. S. 435 (1918), the issue will then present itself as to whether the present suit is sustained by the facts. If the right to sue is sustained, the questions will then present themselves (1) as to whether the amendatory act of 1943 applies to this case in which information was promptly furnished to the Attorney General by the petitioner and (2) as to the validity of the amendment if it applies, which gives to the Attorney General conrol of pending cases; leaves to the discretion of the Court any award to the person who brought the suit; and reduces such award to one-fourth of the proceeds of the suit if prosecuted to final judgment by such person, and to one-tenth of such proceeds, if the suit is carried on by the United States. The present case would present no possibility of suit in Court of Claims, as was suggested in *Sherr* v. *Anaconda Wire and Cable Company*, 149 Fed. 2d. 680, in which certiorari was denied by this Court on November 5, 1945.

Reasons Relied upon for Allowance of Writ.

It is important that this Court should determine whether there were continuous actions by respondents within the preceding six years, or whether the cause of action accrued during that period, and, if not, whether the six-year period includes a period of fraudulent concealment. The construction as to a period of fraudulent concealment is essential to the application of the present Act, and as an indication of this Court's construction of similar provisions in other acts.

If this suit were instituted within the statutory period, it is also important to determine (1) whether the amendatory act of 1943, if applicable to this suit, authorizes the Attorney General to take over a case in which information had been furnished to the Department of Justice; and (2) whether such

amendatory act applies to and restricts the rights of petitioner under the Fifth Amendment in a suit pending at the time of its enactment and as to which the expense was paid by petitioner.

Your petitioner also seeks to have this Court consider the expressed intent of the Circuit Court of Appeals to relieve the defendants from any charges of improper conduct (R. 95). In an effort to sustain this objective, the Circuit Court of Appeals relies upon an inference as to the duties of the Attorney General, and upon an allegedly confirmed report regarding the liquidation of collateral here involved (R. 96, 53), and ignores an order of the United States District Court which is in the record and shows a Government loss of some fifteen million dollars (R. 67-70). With respect to the value of collateral, the opinion of the Circuit Court of Appeals makes findings of fact adversely to petitioner on the ground that proof has not been produced in a case where there has been no opportunity for trial (R. 96).

Respectfully submitted,

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